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No. 83-1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

V.

ITT LIGHTING FIXTURES, INC. DIVISION OF ITT CORP.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Should this Court grant a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit where, in the proceedings below:

1. The Court of Appeals held that the National Labor Relations Board's findings[1] that Respondent[2] unlawfully refused to bargain with Petitioner were not supported by substantial evidence;[3]

2. The Court remanded the case to the Board for further findings as to whether the Employer's groupleaders were supervisors and, if so, whether their pro-union activity could have effectively affected the votes of employees;

3. On remand the Board found such groupleaders to be supervisors, but failed to evaluate the impact of their pro-union activity on the votes of employees as directed by the Court of Appeals; and

4. Subsequently, the Court of Appeals again refused to enforce the Board's Order.

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[1]Hereinafter "the Board."

[2]ITT Lighting Fixtures, Inc., Division of ITT Corporation (hereinafter "the Company" or "the Employer").

[3]International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (hereinafter "Petitioner" or "the Union").

CORPORATION LIST

Respondent ITT Lighting Fixtures, Inc. is a Division of ITT Corporation ("ITT"). ITT or its subsidiaries own more than twenty percent (20%) of the common stock of the following publicly-traded domestic corporations: Piper Jaffray, Inc. (25%); Thompson, McKinnon, Inc. (25%); and Wheat First Securities, Inc. (25%).

TABLE OF CONTENTS

		Page
OPINIONS BELOW		2
STATEMENT OF THE CASE		3
I.	The Initial Proceedings Before The Board	3
II.	The First Decision Of The Court Of Appeals	3
III.	The Board's Decision On Remand	6
IV.	The Second Decision Of The Court Of Appeals Denying Enforcement Of The Board's Order	9
SUMMARY OF ARGUMENT		12
ARGUMENT		13
I.	The Decisions Of The Court Of Appeals Are Within The Judicial Mainstream	13
	A. The First Decision Of The Court Of Appeals	13
	B. The Board's Decision On Remand	14
	C. The Court Of Appeals' Second Decision	17
	D. The Court's Decisions Herein Are Not In Conflict With Decisions Of Any Other Circuit	18
II.	These Cases Do Not Present Recurring Questions, Nor Are The Issues Herein Of Unusual Practical Importance	22
III.	These Cases Do Not Satisfy The Supreme Court's Standards For Granting Certiorari	23
CONCLUSION		25
CERTIFICATE OF SERVICE		26

TABLE OF AUTHORITIES

CASES — Page

Delchamps, Inc., 210 NLRB 179 (1974) 4, 6, 10, 14

Fall River Savings Bank v. NLRB, 649 F.2d 50 (1st Cir. 1981) 20

Flint Motor Inn Co. d/b/a Sheraton Motor Inn, 194 NLRB 733 (1971) 4, 6, 10, 14, 20

Ideal Electric and Manufacturing Co., 134 NLRB 1275 (1961) 20

ITT Lighting Fixtures, Division of ITT Corp. v. NLRB, 719 F.2d 851 (6th Cir. 1983) 21

Medical Center at Bowling Green v. NLRB, 712 F.2d 1091 (6th Cir. 1983) 20

NLRB v. Howard Johnson Motor Lodge, 705 F.2d 932 (7th Cir. 1983) 20

NLRB v. Klinger Electric Corp., 656 F.2d 76 (5th Cir. 1981) 19

NLRB v. Lamar Electric Membership Corp., 362 F.2d 505 (5th Cir. 1966) 20

NLRB v. Manufacturer's Packing Co., 645 F.2d 223 (4th Cir. 1981) 18, 19, 23

NLRB v. Northeastern University, 707 F.2d 15 (1st Cir. 1983) 19

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 23, 24

NLRB v. San Antonio Portland Cement Co., 611 F.2d 1148 (5th Cir.), *cert. denied*, 449 U.S. 844 (1980) 19, 20

TABLE OF AUTHORITIES — Continued

CASES — Page

NLRB v. St. Mary's Home, Inc., 690 F.2d 1062 (4th Cir. 1982) 19

NLRB v. Wehrenberg Theaters, Inc., 690 F.2d 159 (8th Cir. 1982) 20

Pittsburgh Plate Glass Co., 115 NLRB 976 (1956) 15

Turner's Express, Inc. v. NLRB, 456 F.2d 289 (4th Cir. 1972) 19

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 14, 24

Worley Mills, Inc. v. NLRB, 685 F.2d 362 (10th Cir. 1982) 18

STATUTES

National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.*:

§2(11) 2
§8(a) (1) 3, 21
§8(a) (5) 2, 3

No. 83-1187

IN THE

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OCTOBER TERM, 1983

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Petitioner,

v.

ITT LIGHTING FIXTURES, INC. DIVISION OF ITT CORP.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, ITT Lighting Fixtures, Inc., Division of ITT Corp., respectfully prays that this Honorable Court *deny* a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, denying enforcement of the Board's Order[1] finding that the Company unlawfully refused to bargain[2] with the Union, and remanding the case to the Board for findings as to whether the Employer's groupleaders were supervisors,[3] and if so, whether their pro-union activity could have effectively affected the votes of employees, is reported at 658 F.2d 934 (2d Cir. 1981).[4] The Board's subsequent Supplemental Decision and Order is reported at 265 NLRB No. 188 (1983).[5] The Court of Appeals' second opinion in this proceeding denying enforcement of the Board's Order is reported at 712 F.2d 40 (2d Cir. 1983).[6]

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[1]252 NLRB 328 (1980), Petitioner's Appendix (hereinafter "Pet. App.") 51a-62a.

[2]In violation of §8(a) (5) of the National Labor Relations Act (hereinafter "the Act"), as amended, 29 U.S.C. §151 *et seq.*

[3]Within the meaning of §2(11) of the Act.

[4]Pet. App. 10a-30a.

[5]Pet. App. 31a-50a.

[6]Pet App. 1a-9a. The Board's unfair labor practice Orders cited above were preceded by its Decision on Review in the representation case related to this matter. Said Decision on Review is reported at 249 NLRB 441 (1980), Pet. App. 63a-68a. In turn, the Board's Decision on Review was preceded by the Regional Director's January 22, 1979 Decision and Direction of Election in Case No. 26-RC-5908; by the Hearing Officer's April 23, 1979 Report and Recommendations on the Employer's election objections; and by the Regional Director's July 10, 1979 Supplemental Decision and Certification of Representative. These Decisions by the Board's finders of fact are reproduced in Respondent's separately bound Appendix (hereinafter "Res. App.") at 1a-6a, 7a-21a, and 22a-34a, respectively.

STATEMENT OF THE CASE

I.
The Initial Proceedings Before The Board

Pursuant to an election petition filed by the Union, the Board's Regional Director conducted a hearing after which he determined that the Employer's 31 groupleaders (alleged to be supervisors by the Company) would be allowed to vote by challenged ballot. Pet. App. 11a-12a, Res. App. 6a. Therefore, the Employer was effectively precluded from "interfering with [the groupleaders'] pro-union campaign activities for fear that such interference would constitute an unfair labor practice." Pet. App. 26a. Following the election at its facilities, the Employer filed objections contending *inter alia* pro-union election interference by many of its groupleaders. In subsequent proceedings the Board concluded that half of the groupleaders were supervisors, but because they were found to be "minor" supervisors, the Employer's objections were overruled. Pet. App. 20a-21a, 67a-68a. Thereafter, the Employer refused to bargain in order to test the Union's certification and the Board (252 NLRB 328 (1980), Pet. App. 51a-62a) found the Employer's refusal to be in violation of §§8(a) (5) and (1) of the Act. The Employer then filed a Petition for Review with the Second Circuit Court of Appeals.

II.
The First Decision Of The Court Of Appeals

In its initial review of the record and proceedings in this case,[7] the Court of Appeals identified the issue as being:

> whether the pro-union statements and activities of many of the Company's groupleaders impaired the employees' freedoms of choice in the election so as to justify setting the election aside. Pet. App. 14a.

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[7] 658 F.2d 934 (2d Cir. 1981), Pet. App. 10a-30a.

In this regard, the court noted that:

> It is well-established that the participation of a supervisor in a union election may in *some* circumstances so undermine the employees' freedom of choice as to warrant setting the election aside. Pet App. 15a (emphasis supplied).

However, the court also recognized that supervisory pro-union activity is not *per se* grounds to set aside an election in every case. Thus, the court expressly found that:

> it is well-settled that an election is not per se invalid merely because there was some pro-union activity on the part of a supervisor. Rather, there must be a showing that the supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice in the election. Pet. App. 16a.

The Court of Appeals then analyzed Board precedent involving the question of pro-union supervisory election interference,[8] and noted that in setting aside such elections, the Board had found that it was not "always necessary that the pro-union supervisor *threaten* to use his supervisory powers in retaliation against an employee who disfavors the union." Pet. App. 17a (emphasis supplied). Rather, in cases where there is no substantial evidence of overt threats by pro-union supervisors:

> the Board would appear to look to two factors in determining whether pro-union supervisory conduct had a coercive effect upon employees: (1) the degree of supervisory authority and (2) the extent, nature and openness of the pro-union activity. Pet. App. 16a.

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[8] *Delchamps, Inc.*, 210 NLRB 179, 180 (1974); *Flint Motor Inn Co. d/b/a Sheraton Motor Inn*, 194 NLRB 733, 734 (1971).

After analyzing extensively the evidence regarding the groupleaders' stipulated "substantial" pro-union activity in this case,[9] and reviewing the Board's own findings with respect to the supervisory powers possessed by these groupleaders (Pet. App. 17a-22a), the Court of Appeals concluded that the Board failed to undertake an evaluation of the record as a whole, *i.e.*, the Board failed to examine the groupleaders' supervisory powers and their pro-union activity *vis-a-vis* the votes of employees. Pet. App. 20a-22a.

Thus, the court found that the Board's factual findings did not go far enough, and that its conclusions were not based upon:

> essential findings relative to two issues: first, whether, based upon the evidence and findings of fact reached

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[9]With respect to the groupleaders' pro-union election campaign activity, there was both testimony from witnesses and a detailed stipulation presented at a post-election hearing on challenged ballots and objections ordered by the Board's Regional Director. Briefly summarized, the undisputed testimony and the factual stipulation showed that approximately one-half of the Employer's 31 groupleaders played a significant role in the Union's organizing effort, beginning with the commencement of the campaign, and continuing up to (and beyond) the actual election. Groupleaders actively and continuously supported the Union in every possible dimension: (1) by constantly urging employees to vote for the Union; (2) by attending union meetings and urging employees to attend; (3) by soliciting and collecting union authorization cards; (4) by openly wearing clothing items containing pro-union slogans; and (5) by making impassioned speeches on behalf of the Union at several Union-sponsored meetings (attended by 40 to 100 rank-and-file employees of the Company). Pet. App. 17a-19a.

Not only were the groupleaders actively and continuously involved on behalf of the Union, but also they actually spearheaded the Union's organizational campaign. Thus, over forty percent (40%) of the Union's trusted in-plant organizing committee consisted of groupleaders. Pet. App. 18a-19a. There were 12 persons on this committee, five of whom were groupleaders. Significantly, the Union's attorney was present at one meeting of the organizing committee, and advised the groupleaders that, in his opinion, they were not supervisors, and therefore they could continue to engage openly in pro-union activity. Pet. App. 18a.

> thereon, the groupleaders or any of them who engaged in pro-union activity during the critical period were "supervisors," setting forth the criteria for such; and then, if so, whether their pro-union activity could effectively affect the votes of employees. By only looking at the groupleaders' challenged ballots the Board has thus far avoided the issue before it—that of whether any of the 175 ballots cast for the Union were affected by the groupleaders' conduct. Pet. App. 23a.

For these reasons, and also because the Board had failed "to either distinguish or reconcile the record before it in this case with its decisions in the similar cases of *Delchamps, Inc., supra,* and *Flint Motor Inn . . . ,supra"* (Pet App. 27a), the court concluded that:

> Due to the lack of specific findings and articulated reasons for the distinction between this case and the cases of *Delchamps* and *Flint,* the Board's action cannot properly be reviewed by this Court. Pet. App. 29a-30a.

Finally, although the court stated that if it were the decision-maker in the case it might find merit to the Employer's election objections based upon pro-union supervisory interference, it recognized that this determination "must initially lie with the Board." Accordingly, the court remanded the matter to the Board "for further proceedings and action in the light of the content of this opinion." Pet. App. 30a.

III.
The Board's Decision On Remand[10]

On remand from the Court of Appeals, the Board acknowledged (and agreed with) the court's finding that "an election is not *per se* invalid merely because there was some pro-union activity on the part of a supervisor." The Board itself then expressly

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[10]265 NLRB No. 188 (1983), Pet. App. 31a-50a.

stated that, *even where the pro-union supervisors have made no threats of retaliation,* their conduct may nevertheless tend to coerce employees' votes in an election. The Board conceded that, in the absence of threats, it examines *two* factors in determining whether there has been election interference by pro-union supervisors: "(1) the degree of supervisory authority, *and* (2) the extent, nature, and openness of the prounion activity." Pet. App. 34a (emphasis supplied).

The Board then announced that:

> We view it as the law of the case, and as the proper statement of the law, that a group leader is a major supervisor only if he possesses the authority to hire, fire, promote, or issue written warnings on his own volition, or has the authority effectively to recommend such action. Pet. App. 35a.

While the Court of Appeals found there was "voluminous testimony" in the record with regard to the groupleaders' "authority effectively to recommend hiring, firing, promotions, or written warnings," in its Supplemental Decision the Board dismissed this finding of the court by stating that "said testimony pertains almost exclusively to groupleaders who did not engage in union activity." Accordingly, although its finders of fact had concluded that *all* groupleaders possessed similar powers,[11] the Board found that the supervisory authority of the 16 groupleaders who *refrained from* pro-union activity was "irrelevant to our decision here." Pet. App. 35a-36a. In addition, the Board opined that the "voluminous testimony" referred to by the court:

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[11]The Board's Hearing Officer in the proceedings below found that there was "little real dispute among the witnesses" and that "all groupleaders have essentially the same employment status, responsibility, and conditions of employment." Res. App. 12a-13a. After the Employer filed exceptions to the Hearing Officer's Report and Recommendations, the Regional Director independently reviewed the evidence and agreed that all of the groupleaders had "similar duties and responsibilities." Res. App. 25a.

> must be viewed in light of the well-established principle that the authority effectively to recommend generally means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation ultimately is followed. Pet. App. 36a (footnote omitted).[12]

As stated above, in its Supplemental Decision the Board initially recognized that, *in addition* to determining whether the groupleaders were supervisors, it *also* was required to evaluate "the extent, nature, and openness of the prounion activity." Pet. App. 34a. However, in the conclusionary portion of its Decision the Board stated that *it must only determine* "whether the group leaders' pro-union activity reasonably could have coerced employees into supporting the Union out of fear of future retaliation." Pet. App. 48a. Since the Board found that none of the pro-union groupleaders "had the authority effectively to recommend hiring, firing, promotions, or written warnings," (Pet. App. 48a) it stated that:

> The type of day-to-day supervisory authority possessed by these group leaders simply did not afford the opportunity for effective retaliation against anti-union employees. Pet. App. 49a.

Accordingly, the Board overruled the Company's election objections and reaffirmed its Certification of Representative. Pet. App. 50a.

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[12]Thereafter, in its Supplemental Decision the Board undertook an evaluation of the record as it specifically related to each of the 15 groupleaders who actually engaged in pro-union election campaign activity. The Board found that there was insufficient evidence for it to make a supervisory finding with respect to two such groupleaders. Regarding 12 of these pro-union groupleaders, the Board found that they were supervisors, but "minor" ones. In the case of one additional pro-union groupleader (Jo Ann Gray) the Board said there was conflicting evidence as to her supervisory duties, but assuming "for purposes of this proceeding" that Gray also was a supervisor, she too was "minor." Pet App. 37a-48a.

IV.
The Second Decision Of The Court Of Appeals Denying Enforcement Of The Board's Order

Shortly after the Board's Supplemental Decision and Order discussed above, the Company filed its second Petition for Review with the Court of Appeals. It is from this July 18, 1983 decision,[13] again denying enforcement of the Board's Order, that Petitioner is seeking a Writ of Certiorari. Initially, the court noted in its decision that "this marks the second appearance of this case before this court," that the court's prior decision "fully details the factual background," and that the court would "assume familiarity with its prior decision and [will herein] recount only the details." Pet. App. 2a.

The court then repeated that it had remanded the case to the Board for, *inter alia*, its evaluation of the "extent, nature and openness of the [groupleaders'] pro-union activity," and for findings regarding whether the groupleaders' "pro-union activity could effectively affect the votes of employees." Pet. App. 5a. The court stated that, upon remand:

> The question of law to be decided was whether the groupleaders' conduct reasonably tended to have a coercive effect on the employees so that it was likely to have impaired their freedom of choice in the election. Pet. App. 5a.

The court then turned to the Board's Supplemental Decision and Order and noted that, contrary to the *Board's* interpretation of the court's first decision:

> this court on the prior review did not approve an *automatic* conclusion that a supervisor's conduct might or might not affect voting based on a distinction between

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[13] 712 F.2d 40 (2d Cir. 1983), Pet. App. 1a-9a.

> "major" and "minor" supervisory authority. Pet. App. 6a (emphasis supplied).

The court emphasized that it was immaterial what "labels" the Board placed upon the groupleaders in this case. Rather, the court:

> wanted to know the criteria developed by the Board for determing whether a supervisor was "major" or "minor," and whether the exercise of a supervisor's authority could have an impact on the laboratory condition for voting. The determination cannot be made, as the Board has done, simply by labeling a supervisor as "minor"; instead there must be consideration of both the extent of the supervisor's authority and the extent of his pro-union activity. Pet. App. 6a-7a.

The court criticized the Board's restrictive interpretation of the authorities necessary to make a person a "major" supervisor,[14] and noted that: "Nowhere in this Court's prior opinion was such a ruling made." Pet. App. 7a. Furthermore, the court found that the Board's distinction between "major" and "minor" supervisory status took into account *only* the power to recommend *adverse* action. Missing from the Board's analysis was the power to *reward* which "can be just as coercive in the election process as the authority to issue written warnings." Pet. App. 7a. The court noted that in past decisions[15] the Board had found supervisory powers to reward employees to be "indications of significant authority," and that the record in the instant case demonstrated that the Employer's groupleaders possessed an abundance of such responsibilities. Pet. Ap. 7a-8a.

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[14] *I.e.*, only the power to hire, fire, promote, issue written warnings, or effectively to recommend such actions.

[15] *Delchamps, supra,* and *Flint Motor Inn Co., supra.*

Thereafter, the court emphasized the closeness of the vote in the election[16] and stated that: "The question is whether these [pro-union] supervisors might have affected the result because of the nature of their authority and the extent of their union activity." Pet. App. 8a. Because the Board failed to make such an analysis on remand, the court did so itself. However, instead of discussing the authorities and activities of *all 15* pro-union groupleaders, by way of illustration, the court focused on five groupleaders, who supervised a combined total of 51 employees.

Those groupleaders specifically mentioned by the court "possessed more than minimal authority to reward employees." Pet. App. 8a. One of them (Joan Carson) could select employees for overtime and issue oral warnings. With respect to Carson's authority to cause the issuance of written warnings, in its Supplemental Decision and Order the Board denigrated such evidence because her superior "would first check the employee's file to see if Carson had [previously] issued an oral warning." Pet. App. 9a. In disagreeing with the Board's analysis of Carson's power to recommend adverse action, the court noted that: "The Act does not preclude supervisory status simply because the recommendation is subject to a superior's investigation." Pet. App. 9a.

Based upon its representative sample of five pro-union groupleaders (out of the total of 15) the court concluded that it "has been shown that 51 employees could possibly have been influenced by the pro-union activity of five of the groupleaders." Accordingly, the court concluded that it could not be said that

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[16]At the February 16, 1979 election, there were 175 ballots cast in favor of the Union, and 153 against it. Included in the total of 34 challenged ballots (which were determinative of the election results) were the 31 ballots cast by groupleaders. Pet. App. 63a. Accordingly (as found by the Court of Apeals), a switch in votes by as few as 12 employees in a total unit of approximately 380 would have resulted in the Union receiving *less* than a majority of the valid ballots cast. Pet. App. 8a.

the election was held under the required laboratory conditions. For this reason, and because "the Board has failed to avail itself of two opportunities to demonstrate the validity of its order" the court vacated it. Pet. App. 9a.

SUMMARY OF ARGUMENT

The Employer respectfully submits that there exist a number of reasons why the Union's Petition for a Writ of Certiorari should be denied. Preliminarily, the Employer notes that in its Petition the Union makes only *passing* reference to the Court of Appeals' first decision[17] denying enforcement to the Board's Order in this case. Indeed, the Union's Petition devotes a scant *one sentence* to that opinion of the court (Petition p. 4) and discloses *none* of the bases for the court's remand. Notwithstanding the fact that in the court's *second* opinion in this case[18] it expressly referred to the first and "assume[d] familiarity with its prior decision," the totality of the Union's argument before this Court is based upon the Court of Appeals' decision *following* its remand to the Board. When the Court of Appeals' second opinion in this proceeding is analyzed in light of both its first decision and the Board's Supplemental Decision on remand, it becomes apparent that the Union's Petition mischaracterizes the court's holding and that a Writ of Certiorari is not warranted.

Furthermore, the Union is incorrect in its assertion that there is a conflict between the decisions of the Court of Appeals in the instant matter and those of other Circuits. Also without merit are the Union's claims that this case presents recurring questions and issues of unusual practical importance. Rather, as detailed below, the cases at bar satisfy *none* of the Supreme Court's standards for granting Certiorari.

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[17] 658 F.2d 934 (2d Cir. 1981), Pet. App. 10a-30a.

[18] 712 F.2d 40 (2d Cir. 1983), Pet. App. 1a-9a.

ARGUMENT

I

The Decisions Of The Court Of Appeals Are Within The Judicial Mainstream

A. The First Decision Of The Court Of Appeals

Contrary to the assertions in the Union's Petition, the court below *did not* make a *per se* finding that pro-union supervisory campaign activity was sufficient grounds to set aside this (or any other) election. Indeed, the court specifically stated that, while such supervisory activity may in *some* circumstances warrant overturning an election, "it is well settled that an election is not per se invalid" for that reason alone. Pet. App. 15a. "Rather, there must be a showing that the supervisor's conduct reasonably tended to have such a coercive effect on the employees that it was likely to impair their freedoms of choice in the election." Pet. App. 16a. Accordingly, as discussed below, the Second Circuit's view of the applicable law in this matter *does not* differ from those cases asserted by Petitioner as being "in conflict" with the instant decisions.

Furthermore, Petitioner erroneously argues that the Court of Appeals' second decision is "in conflict" with certain cases cited by Petitioner because the instant case did not involve "express or tacit threats or promises of benefit." Petition p. 7. Contrary to this assertion, in its decisions the court merely observed that in prior cases *the Board itself* has set aside elections in the absence of overt threats by pro-union supervisors.[19]

In its first decision in this case, the court's disagreement with the Board was that it had theretofore avoided applying its own standards of review in cases of this nature, *i.e.*, the Board had not

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[19]Significantly, in its Supplemental Decision the Board *agreed* with the court's view of the law in this respect, a critical point which is conspicuously absent from the Union's Petition.

determined whether the pro-union groupleaders were supervisors, and if so, whether their activity impacted upon the election. Pet. App. 23a. Instead, the Board had merely labeled the groupleaders "minor" supervisors, totally disregarded their stipulated substantial pro-union activity, and failed to evaluate the impact of that activity on the voters. Moreover, the Board also failed to explain its departure herein from the precedent which it established in the similar cases of *Delchamps, Inc., supra* and *Flint Motor Inn, supra.*

Clearly, under these circumstances the Court of Appeals *would have been* completely justified in concluding that the Board's findings were not supported by substantial evidence on the record as a whole,[20] and on that basis denying enforcement outright. Instead, the court remanded the case to the Board with *specific* instructions for it to determine the supervisory status of the employer's groupleaders, *and then* to analyze their extensive pro-union activity and determine whether such activity "could effectively affect the votes of employees." Pet. App. 23a.

B. The Board's Decision On Remand

As discussed above, in its Supplemental Decision and Order the Board *agreed* with most of the court's critical legal analyses in this matter. Thus, the Board reaffirmed its prior holdings that overt threats of retaliation by pro-union supervisors are not the *sine qua non* in election interference cases. The Board stated that in elections lacking evidence of such threats, it looks to *two* crucial points: "(1) the degree of supervisory authority, *and* (2) the extent, nature, and openness of the prounion activity." Pet. App. 34a (emphasis supplied). However, at the conclusion of its Supplemental Decision the Board *contradicted* this initial finding and held that, because it had labeled the groupleaders as "minor" supervisors, it was *per se unnecessary to consider their pro-union activity at all.*

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[20] *See Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951).

With regard to its supervisory findings on remand, the Board made a number of egregious errors. Two examples illustrate this point. Thus, the Board conceded that there was record evidence that pro-union groupleader Jessie Merriweather possessed the "major" supervisory authority effectively to recommend written warnings. Likewise, there was testimony that pro-union groupleader George McGhee had the "major" supervisory authority effectively to recommend discharge, suspension, or layoff. Pet. App. 35a, n. 9. Yet incredibly, *later* in its Supplemental Decision the Board *again* discussed Merriweather and McGhee and (contradicting its earlier findings) concluded that *neither* groupleader possessed "major" supervisory authority. Pet. App. 43a-45a, 48a.

Furthermore, central to the Board's analysis of the supervisory powers possessed by all 15 pro-union groupleaders in this case, was its observation that it was applying a so-called "well established principle" that the authority effectively to recommend "means that the recommended action is taken with *no* independent investigation by superiors, not simply that the recommendation ultimately is followed." Pet. App. 36a. Following this initial premise, the Board denigrated the authorities of the pro-union groupleaders because their recommendations were subject to review by their superiors. However, the "well established principle" advanced by the Board in *this* case is *totally at odds* with its decisions in *previous* cases holding that "the mere fact that such recommendations are subject to review and independent investigation does not necessarily prevent them from being given *substantial weight* as *effective* recommendations."[21]

In conclusion, after stating the *correct* legal standard that in cases involving non-threatening supervisory election campaigning an evaluation of "the extent, nature, and openness of

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[21] *Pittsburgh Plate Glass Co.*, 115 NLRB 976, 977 (1956) (emphasis supplied).

prounion activity" must be made, the Board then: (1) formulated a *new* highly restrictive definition of the powers necessary to make an individual a "major" supervisor; (2) focused *only* on the supervisory powers to recommend *adverse* action, and completely disregarded the voluminous record testimony that these groupleaders had potentially coercive authority to grant or deny *rewards;*[22] (3) made internally inconsistent findings regarding the "major" supervisory authority possessed by two of the pro-union groupleaders; (4) ignored or misinterpreted the record evidence with respect to many other groupleaders;[23] and (5) *misstated its own legal principles* on the issue of the effectiveness of supervisory recommendations. Then, without even an attempt to determine what impact the groupleaders' campaign had upon the election,[24] the Board reaffirmed its earlier order in this case.

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[22]Clearly, the power to grant or deny rewards (which all of the Employer's groupleaders possessed) can be highly coercive. Thus, a pro-union groupleader bent on retaliation could coerce employees by: (1) denying them permission to have time off from the job; (2) refusing to assign overtime to dissident employees; (3) adjusting their grievances unfairly and arbitrarily; (4) assigning them to disagreeable jobs; (5) transfering them to undesireable departments; etc.

[23]As discussed above, while the Board's finders of fact concluded that all groupleaders herein had similar duties and responsibilities (note 11 *supra*), the Board found that the supervisory authorities of the 16 groupleaders who *did not* engage in pro-union activity were "irrelevant." Pet. App. 35a-36a. By totally ignoring the *substantial* authorities of these 16 "irrelevant" groupleaders, the Board on remand committed a number of fundamental errors in its supervisory analysis. For example, at the hearing a rank-and-file employee (as well as two members of management) testified without contradiction that pro-union groupleader Gray exercised the same authority as groupleader Robert Johnson, whom the Board found to be "major" but "irrelevant" because he had not engaged in pro-union activity. The Board failed to consider this critical testimony with respect to Gray.

[24]As the Board was specifically instructed to do in the court's remand.

C. The Court Of Appeals' Second Decision

As stated, in the Court of Appeals' second decision in this case it expressly adopted by reference the findings in its first opinion. Pet. App. 2a. The court emphasized that its remand instructions to the Board had been quite specific, and that the Board was required to analyze whether the "groupleaders' conduct reasonably tended to have a coercive effect on the employees so that it was likely to have impaired their freedom of choice in the election." Pet. App. 5a.

Contrary to the Union's contentions in its Petition, the court *did not* outright reject the Board's position that in election interference cases it might make a difference that a supervisor was "major" or "minor." Indeed, the court merely stated that in its first decision it did not approve of the Board's *"automatic"* conclusion that such a distinction "might or might not affect voting." Pet. App. 6a (emphasis supplied). In this regard, the court said that it was not interested in convenient "labels" the Board might use on remand, and that "instead there must be consideration of both the extent of the supervisor's authority *and* the extent of his pro-union activity." Pet. App. 7a (emphasis supplied).

The court concluded that the Board's Supplemental Decision was not supported by substantial evidence for two fundamental reasons. First, the Board only considered the groupleaders' authority to effect *adverse* actions against employees, and did not take into account the voluminous record testimony that they also could grant or withhold *rewards*. Second, with respect to the groupleaders' power effectively to recommend adverse actions, the Board found such authority to be lacking herein because the groupleaders' recommendations were customarily reviewed by higher authority. However, as discussed above (and as found by the court), it has long been established that: "The Act [as well as Board precedent] does not preclude supervisory status simply

because the recommendation is subject to a superior's investigation." Pet. App. 9a.

Finally, because on remand the Board had failed totally to follow instructions from the court to evaluate the impact of the substantial pro-union supervisory activity upon this extremely close election, the court did so itself. Using a representative sample of five pro-union groupleaders, the court concluded that their activity could have influenced a sufficient number of votes as to warrant denying enforcement of the Board's Order, particularly since "the Board has failed to avail itself of two opportunities" to demonstrate its validity. Pet. App. 9a.

D. The Court's Decisions Herein Are Not in Conflict With Decisions Of Any Other Circuit

As the Court of Appeals pointed out in *NLRB v. Manufacturer's Packing Co.*, 645 F.2d 223 (4th Cir. 1981):[25]

> whether pro-union supervisory activity is sufficient to overturn an election *depends on the facts and circumstances of each case. Id.* at 225-26 (emphasis supplied).

Therefore, as the following brief summary of the cases cited by Petitioner discloses, the particular facts and circumstances in the instant matter constitute no "conflict" with any other Circuit.

1. In *Worley Mills, Inc. v. NLRB*, 685 F.2d 362 (10th Cir. 1982), as here, the court held that pro-union supervisory involvement is not *per se* a reason to invalidate an election. *Id.* at 365. However, there the court enforced the Board's Order because the pro-union activity of three supervisors was minimal at best, and the activity of one of them *ceased* prior to the election. *Id.*

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[25]A case which the Union relies on in its Petition (pp. 9-10).

2. In *NLRB v. Northeastern University*, 707 F.2d 15 (1st Cir. 1983), the single pro-union supervisor "later disavowed the union." *Id.* at 19.

3. In *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062 (4th Cir. 1982), the pro-union activities "occurred two or three months before the election." *Id.* at 1069.

4. In *NLRB v. Manufacturer's Packing Co.*, 645 F.2d 223 (4th Cir. 1981), the pro-union supervisory activities were "minimal," and *ceased completely* "a full seven weeks prior to the election." *Id.* at 225. Also in *Manufacturer's Packing*, the Fourth Circuit discussed its earlier decision in *Turner's Express, Inc. v. NLRB*, 456 F.2d 289 (4th Cir. 1972), and held that the court:

> did not read *Turner's Express, Inc.*, as establishing a per se rule invalidating an election if there is any evidence of pro-union supervisory activity. 645 F.2d at 225-26.

Accordingly, since the Second Circuit in the instant case *also* eschewed such a *per se* approach, *all* Circuits are in harmony on this issue.

5. In *NLRB v. Klinger Electric Corp.*, 656 F.2d 76 (5th Cir. 1981), the court was heavily influenced by the fact that (unlike here) the union won the election by a wide margin. *Id.* at 85-86. Moreover, in *Klinger* only two of the eight leadpeople (assumed to be supervisors) made "isolated and relatively mild" pro-union comments. *Id.* at 86.

6. In *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148 (5th Cir.), *cert. denied*, 449 U.S. 844 (1980), the Board found (with court approval) that two of the three pro-union persons alleged to be supervisors were, in fact, non-supervisory. Since the single pro-union supervisor merely wore a union button and passively attended one union meeting, the court enforced the Board's Order. *Id.* at 1151-52. It is significant, however, that the court contrasted the facts in that case with those in *NLRB v.*

Lamar Electric Membership Corp., 362 F.2d 505 (5th Cir. 1966). Thus, in *Lamar Electric*, one supervisor made a speech at a union meeting which was *remarkably* similar to the speech given by groupleader Gray in the instant matter. The *San Antonio Portland Cement* court said that in *Lamar Electric*, it concluded that such evidence "made out a prima facie case of supervisory coercion." 611 F.2d at 1152.[26]

7. In *Medical Center at Bowling Green v. NLRB*, 712 F.2d 1091 (6th Cir. 1983), the evidence showed that the supervisors' "participation [on behalf of the union] was minimal." *Id.* at 1094.

8. In *NLRB v. Wehrenberg Theaters, Inc.*, 690 F.2d 159 (8th Cir. 1982), there was no evidence that the supervisor in question "coerced or induced" the signing of union authorization cards. *Id.* at 162.

9. In *Fall River Savings Bank v. NLRB*, 649 F.2d 50 (1st Cir. 1981), the Board found (with court approval) that a number of the persons alleged to be supervisors were in fact, merely rank-and-file employees. *Id.* at 55. Moreover, unlike here, in *Fall River* the employer was not foreclosed from controlling the pro-union activities of its supervisors by a refusal of the Regional Director to decide supervisory issues prior to the election. *Id.* at 56, n.5.

10. The final case cited by Petitioner in support of its "conflict" argument actually supports the *Employer* herein. Thus, in *NLRB v. Howard Johnson Motor Lodge*, 705 F.2d 932 (7th Cir. 1983), the Regional Director denied the employer's request for a hearing on its objections (which alleged pro-union election interference similar to the instant case). Like the Second Circuit in the case at bar, the court in *Howard Johnson* noted that the Board's Order was at odds with its decision in *Flint Motor Inn, supra.*

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[26]The *Lamar Electric* case also involved supervisory threats, but since such threats occurred *after* the election, they clearly could not have impacted upon the results. *See Ideal Elec. & Mfg. Co.*, 134 NLRB 1275 (1961).

Accordingly, the Seventh Circuit remanded the case to the Board with instructions to conduct an evidentiary hearing.

11. Finally, in a collateral proceeding involving this Employer, *ITT Lighting Fixtures, Division of ITT Corp. v. NLRB,* 719 F.2d 851 (6th Cir. 1983), one issue was the supervisory status of groupleader Gray, whom the Board had found was non-supervisory and was transferred in violation of §8(a) (1) of the Act. In denying enforcement to that portion of the Board's Order, the Sixth Circuit found that:

> The Second Circuit [in the instant case] held, *inter alia* that the Board had failed, after two opportunities, to formulate a comprehensive interpretation of the statutory definition of a supervisor.
>
> After perceiving the Board's inconsistency and confusion on this issue in this and the collateral proceedings . . . we also reverse the Board. The decision of the Board [in its Supplemental Decision following remand from the Second Circuit] that Ms. Gray was a supervisor is based on a set of vague and confusing standards which bear little resemblance to the statutory definition. The distinction between "major" and "minor" supervisors, for instance, does not provide any guidance nor is it based on the criteria in the statute. *Id.* at 858.

Accordingly, *two* Courts of Appeals have been called upon to review the Board's decisional process based upon the record below, and *both* have found the Board's Order to be unsupported by substantial evidence. For this reason, rather than a "conflict" in the Circuits regarding this case, there is instead *unanimity,* "and consistency of decisions among the Circuits." 719 F.2d at 858.

II.
These Cases Do Not Present Recurring Questions, Nor Are The Issues Herein Of Unusual Practical Importance

Contrary to the contentions of Petitioner, these cases present no recurring questions, nor do the issues involved rise to the level of "unusual practical importance." Petition, p. 6. Thus, as can be gleaned from the discussion above, it is highly unusual for either the Board or the Courts of Appeals to be confronted with a set of factual circumstances like the one herein. Many of the cases cited by the Union in its Petition involve only minimal and insubstantial pro-union activity by a few isolated supervisors, and the unions involved won the elections by wide margins. Here, however, the vote was *extremely* close, and approximately one-half of the Employer's 31 groupleaders played an open and active pro-union role in the campaign. Indeed, the groupleaders herein constituted forty percent (40%) of the Union's trusted and invaluable organizing committee.

In *no other such case* did the Board so restrict its definition of "major" supervisor as to disregard the supervisors' power to grant or deny rewards. In several of the cases cited by Petitioner, the employer could be (and was) faulted for having failed to control the pro-union activities of its supervisory staff. Here, however, the Regional Director foreclosed the Company from effectively controlling its groupleaders by his initial refusal to decide their supervisory status.

More significantly, in the instant case it was *the Union itself* which capitalized upon and intensified the Employer's dilemma. Thus, the Union's own attorney erroneously advised the groupleaders that they were *not* supervisors, and he encouraged them to continue with their active pro-union support. In no case cited by Petitioner was the union itself so *directly responsible* for the extant supervisory election interference.

Significantly, none of the cases relied upon by the Union in its

Petition involved the Board disregarding specific remand instructions by a court of appeals, as this one did. In no such case were the Board's factual findings internally contradictory as was its Supplemental Decision here. Moreover, of all the cases cited by Petitioner, *none* involved (as here) the Board's contradiction of its own precedent on the issue of the effectiveness of supervisory recommendations.

In sum, since the Court of Appeals herein is in agreement with other circuits that pro-union supervisory conduct is not *per se* grounds to set aside an election, and since (as stated by the Fourth Circuit) "whether pro-union supervisory activity is sufficient to overturn an election depends on the facts and circumstances of each case,"[27] the circumstances of *this* case are extremely *unlikely* to recur.

III.
These Cases Do Not Satisfy The Supreme Court's Standards For Granting Certiorari

As demonstrated above, there is no conflict whatsoever between the decisions of the court below and those of any other circuit. Furthermore, these cases do not present recurring questions, nor are the issues herein of "unusual practical importance" so as to warrant the granting of Certiorari. Rather, as this Court stated in *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951):

> Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Lane & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). *Id.* at 502.

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[27] *NLRB v. Manufacturer's Packing Co.*, 645 F.2d at 225-26.

In cases of the type presented in the instant Petition:

> The same considerations that should lead us to leave undisturbed, by denying Certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this one is, on other legal issues. *Id.* at 502-03.

Even though the Supreme Court might have decided the matter differently (if it was in the place of the lower court):

> In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543 (1927). *Id.* at 503.

Furthermore, as this Court found in the case of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951):

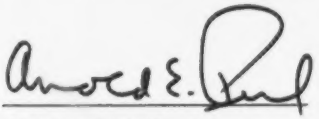
> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. *Id.* at 491.

Clearly, the instant matter is *precisely* the type of situation this Honorable Court had in mind in the two cases cited above, which are the touchstone decisions for determining the scope of review by the Federal judiciary in National Labor Relations Act proceedings.

CONCLUSION

For the foregoing reasons, the Employer submits that the Union's Petition fails to satisfy this Court's criteria for the granting of a Writ of Certiorari. Therefore, the Employer respectfully urges this Honorable Court to deny the Union's Petition.

Respectfully submitted,



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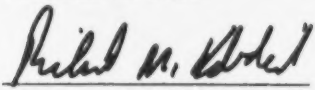

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